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In the Supreme Court of the United States

Leon C. Baker P.C. and Leon C. Baker, individually,
Petitioners

v.

Merrill Lynch, Pierce, Fenner & Smith Inc.,
Respondent

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

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Preliminary Statement

Simultaneously with the filing of this Reply Brief Petitioners are submitting a Supplemental Brief pursuant to Supreme Court Rule, Paragraph 8. The most important matter set forth in the Supplemental Brief is that this Court has granted certiorari in *Howsam v. Dean Witter,* No. 01-180, which presents substantially the same issue as this case.

In that case, just as in this one, the question is whether courts should rule on affirmative defenses

notwithstanding that the parties have contracted to submit *all* their disputes to arbitration. The grant of certiorari in *Howsam* makes clear that the issue raised by this case is worthy of, and ripe for, consideration by this Court. Petitioners respectfully refer the Court to that Brief.

The bulk of Merrill Lynch's brief—twelve of its fifteen pages—is devoted to invective impugning the character of Petitioner Baker. Like all ad hominem argument, it is designed to divert the attention of the reader from the relevant considerations. When such irrelevant and improper tactics are directed at people as sophisticated as the members of this Court, the most effective response is no response at all.

In the present case, however, Merrill Lynch has interspersed in its ad hominem ramblings statements of "fact" which are untrue. Petitioners, therefore, have the distasteful necessity, in Point III, to respond to several of Merrill Lynch's prevarications point by point.

POINT I

CONTRARY TO MERRILL'S CONTENTION, THERE IS A SPLIT OF AUTHORITY AMONG THE CIRCUIT COURTS OF APPEALS AND STATE COURTS AS TO WHETHER ARBITRATORS SHOULD DECIDE PRECLUSION ISSUES.

Eleven pages of the Petition for Certiorari, 16 through 26, are devoted to demonstrating that federal Circuit Courts of Appeals and state courts are sharply divided on the issue of who should decide preclusion

issues---courts or arbitrators---when the parties have agreed to submit all of their disputes to arbitration. Of the cases discussed, four held that courts should decide, three held that arbitrators should decide, and one went both ways, holding that courts should rule on the preclusion effect of judgments and arbitrators should rule on preclusion effect of awards.

The Alabama Supreme Court, in its opinion in this case, devotes four and one half pages to a discussion of the conflicting decisions of the federal and state courts. (Appendix C-12 through C-16) The Alabama Supreme Court declared:"The issue has been addressed in other jurisdictions, and those courts have reached divergent conclusions." (Appendix C-12)

Nevertheless, Merrill Lynch insists in Point I of its Argument: "Under the facts of this case, there is no dispute among courts." Merrill Lynch does not explain away the obvious disagreement among the courts, much less, how the facts of this case could possibly resolve the disputes among the courts on questions of law.

In its attempt to show that there is no conflict in the Circuit Courts of Appeals Merrill Lynch seeks to explain away the holdings of three decisions (discussed at pages 22 through 27 of the Petition) which hold most strongly that arbitrators are to decide preclusion issues when the parties have agreed to arbitrate all their disputes. Merrill Lynch seeks to reconcile those decisions by proposing that, regardless of what the courts may have said, they and the Alabama Supreme Court in this case were really applying a simplistic rule: Arbitrators

should decide the preclusion effect of arbitration awards and courts should decide the preclusion effect of judgments. Even if the decisions could be so construed, it would be impossible to reconcile such a rule with an agreement to submit *all* disputes to arbitration.

In addition to attempting to explain away the three cases cited by Petitioner, Merrill Lynch "distinguishes" by the same rationale *Consolidated Coal Co v. United Mine Workers*, 213 F.3d 404 (7th Cir. 2000), a case petitioners did not cite. The seventh circuit held that when different arbitrators under a single union contract render inconsistent decisions, courts must not attempt to resolve the conflict but must confirm both awards, leaving to subsequent arbitration the question of which award to follow. That ruling certainly does not support Merrill Lynch's contention that preclusion issues are too recondite for arbitrators and should be ruled on by judges, regardless of what the parties agreed.

In any event, contrary to Merrill Lynch's contention, this Court recognized that a conflict among the lower courts does exist when it granted certiorari in *Howsam.*

POINT II
PETITIONERS PRESERVED IN THE ALABAMA COURTS THE ARGUMENTS THEY MAKE HERE.

Merrill Lynch reasserts an argument it made without success in the Alabama Supreme Court: It is impermissible to cite on appeal any authority which had not been cited in the trial court. In particular, Merrill

Lynch argued that the Alabama Supreme Court should not give any cognizance to *National Fire Insurance Company of Pittsburgh v. Belco Petroleum Corp.*, 88 F.3d 129(2d Cir.1996), because the Petitioners cited it for the first time on their motion for a new trial in the circuit court. Petitioners pointed out that it is universal for lawyers to do much more extensive research on an appeal than they usually have time for at the trial level. The Alabama Supreme Court in its opinion discussed not only the Belco case but ten others which had not been cited in the trial court. (Appendix C)

POINT III
MERRILL LYNCH'S IRRELEVANT AD HOMINEM ATTACK AND ITS DISPARAGING ALLEGATIONS HAVE NO SUPPORT IN THE RECORD.

Merrill Lynch, in its Brief In Opposition to the Petition for Certiorari, has applied the adage "if you are weak on the law, argue the facts." Unfortunately for Merrill Lynch, it is equally weak on the facts. Its solution: Invent better facts.

A. The Truth As To "Four" Previous Petitions for Certiorari

None of Merrill Lynch's ad hominem aspersions relates to litigation in which Merrill Lynch itself was a party. It has no complaint concerning Baker's conduct either in the Florida arbitration or in either of the Alabama courts.

Baker, it is true, did file two petitions for

certiorari in the *Bennett* litigation, in the case the Alabama Supreme Court refers to as Alabama-Baker I. The first Petition was directly from that decision. The second, as is set forth more fully below, was from a Florida decision on a Fourteenth Amendment jurisdiction issue. Merrill Lynch was not involved in either of those two cases. What is truly significant about Alabama-Baker I is that six years later the Alabama Supreme Court *sua sponte* overruled its decision against Baker (Pet. p. 10). In short, Merrill Lynch's implication that Baker has been showering this Court with petitions for certiorari is untrue. In any event, no rule of law is better settled than that denial of certiorari is not a decision on the merits or a precedent.

B. The Truth As To The Madison County Litigation

Merrill Lynch devotes two and one half pages of its brief to a purported description of "The Madison County Litigation" (Alabama-Baker I). Nowhere does Merrill Lynch disclose that the Alabama Supreme Court overruled its decision against Baker in that case six years later in *State Farm Fire & Cas. Co. v. Owen*, 729 So. 2d 834 (Ala. 1998). Moreover, as is set forth below, Merrill Lynch's statement of the facts in that case runs the gamut from misleading to outright falsehood. More important, Merrill Lynch's entire recital, even if it were true, would have no relevance to a decision concerning granting certiorari to decide the important arbitration issue presented by this case.

The Bennett litigation arose out of a computer leasing transaction more than 20 years ago between

parties completely unrelated either to the present litigation or to the three lawsuits against Baker in Alabama. Those unrelated persons were Gibbs and West, the owners of a coal mine in Alabama, and Atlantic Computer Leasing Ltd., an English computer leasing company("Atlantic"). Baker was the attorney for Atlantic.

The facts and proceedings in the Bennett litigation are set forth at pages 7 through 14 of the Petition for Certiorari. Merrill Lynch does not contest the accuracy of that description. Nevertheless, Merrill Lynch in its Brief In Opposition, commencing at page 3, sets forth the allegations of the Bennetts' *complaint* as if these were the facts found by the Alabama courts. In fact, the Alabama Supreme Court did not hold that there was any evidence of misrepresentation by Baker or any intentional omission to disclose facts.

The Alabama Supreme Court held that the jury could have found Baker liable, at most, for innocent nondisclosure. Six years later, in *State Farm Fire & Cas. Co. v. Owen*, *supra*, the Alabama Supreme Court overruled that decision. Baker did not learn of this, however, until it was too late to reverse the judgment.

It is true that Baker unsuccessfully resisted enforcement of the Bennetts' judgment in his home state of Florida on the ground that the Alabama courts never had obtained personal jurisdiction over him. Alabama claimed jurisdiction by virtue of two long distance telephone calls to New York which the accountants for Bennetts had made *to him* and a return telephone call

Baker made to the accountants informing them that his English client, Atlantic Leasing Company Ltd., had consented to the transfer from Gibbs and West to Bennett.

It is true, as Merrill Lynch alleges, that Baker sought certiorari from this Court on the jurisdiction issue, which was denied. Nevertheless, Baker's due process objection clearly was far from frivolous.

It is not true, as Merrill Lynch alleges, that "a Florida appeals court sanctioned Baker for taxing judicial resources with his frivolous filings." What actually occurred is that Baker's Florida counsel mistakenly filed a reply brief in support of a petition for certiorari from the Florida Supreme Court. This is not authorized by the Florida Supreme Court rules. The Court imposed a fine of $100. Merrill Lynch's allegation may not be an outright lie, but it certainly is a gross exaggeration.

Merrill Lynch declares that Baker owned the leasing company and received $1.3 million from the Bennetts. Both of these allegations are absolutely false.. Baker had no ownership at all in Atlantic Computer Leasing Ltd. Bennett made his purchase from Gibbs and West, not from Atlantic, much less Baker. Of the $1.3 million which Gibbs and West paid, $1.25 million was paid to the manufacturer of the computer, IBM. Atlantic made a modest profit on the sale to Gibbs and West and Baker received a legal feefrom his client. The Bennetts did not deal with Baker and paid Baker nothing.

Finally, Merrill Lynch completes its discussion of

"The Madison County Litigation"with a truly offensive and unprofessional accusation: "Baker is a wealthy man. . . It would not have been unduly difficult for him to pay the $440,025 Madison County judgment."

By the same standard, Merrill Lynch is an extraordinarily rich corporation, with billions of dollars in assets. It would not be "unduly difficult " for Merrill Lynch to reimburse Leon C. Baker P.C. for the $723,353 which was taken from its account by virtue of Merrill Lynch's initial negligence and its subsequent complicity.

These two foregoing arguments are absurd and improper. The difference between them is that Merrill Lynch has used its version in an obvious effort to prejudice the Court against Baker. Petitioners have responded only to show the ridiculous lengths to which Merrill Lynch has gone in its efforts to find some ground for denying the Petition for Certiorari.

Merrill Lynch next purports to summarize "The Jefferson County Litigation" but neglects entirely, even to mention, the negligence of Merrill Lynch in submitting as an account statement of Baker a statement of Leon C. Baker P.C. with the "P.C." omitted. That omission is a fundamental undisputed fact. Merrill Lynch's failure even to mention the omission in its purported summary is consistent with its general lack of candor with respect to the facts.

Merrill Lynch proceeds to argue the merits of whether the judgment in the Jefferson County Court has any collateral estoppel effect, ignoring the principal issue

in this case, namely, whether the preclusion issue is one of those which Merrill Lynch and the P.C. agreed that the arbitrators should decide when they contracted to submit "all" their disputes to arbitration.

Merrill Lynch ends its purported description of the Jefferson County proceedings with an outright falsehood. It declares: "The Alabama Supreme Court, however, affirmed the circuit court's order *in its entirety*, without opinion. (Emphasis added.) The truth is that the P.C. could not appeal, and did not even attempt to, because it was not a party to the Jefferson County action (Alabama-Baker III). Under Alabama law only parties can appeal. Baker was a party, but he could not appeal from the order directing Merrill Lynch to pay $723,353 to the Bennetts. The funds were seized from the P.C.'s account, not his.

Baker only appealed, from an order fining him for not appearing. He alleged, as grounds for setting aside the fine, among others, (1) that the Jefferson County Circuit Court had no personal jurisdiction over him, (2) that no summons or other process had been served on him, 3) that his victory in Alabama-Baker II was res judicata and barred the Jefferson County action, and 4) that the Circuit Court erred in fining him $90,000, far in excess of the statutory limit. The truth belies Merrill Lynch's assertion that Baker-Alabama IV is res judicata with respect to any issues relevant to the Petition.

CONCLUSION

This Court should grant the Petition for Certiorari.

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